Fighting the Backlash – The South African High Court on the Suspension of the SADC Tribunal

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Felix Lange Do 30 Aug 2018 Do 30 Aug 2018

Only one year after its now famous judgment on the South African withdrawal from the International Criminal Court, the South African High Court has once again demonstrated that it will not shy away from directly confronting the government in an important matter of foreign policy: On 1 March 2018, the Court decided that South Africa's signing of a new protocol, intended to strip the Southern African Development Community Tribunal (SADC Tribunal) of its jurisdiction for individual complaints, violates the South African constitution. While the former judgment effectively led to withdrawal from the withdrawal and bought time for reconsidering South Africa's position towards the ICC, this year's decision appears even more ground-breaking, from the perspective of foreign relations law, and yet has received much less attention. In the 2017 ICC withdrawal case, the High Court found a violation of formal rules on the separation of powers in foreign affairs. In its 2018 decision, it argued that the foreign policy decision to suspend the SADC Tribunal violated substantive human rights. Since the Ramaphosa government appealed the latest High Court judgment, the South African Constitutional Court will eventually have the last word on this case. The hearings are scheduled for this Thursday, 30 August.

One Step Forward, One Step Back – The Establishment and Dismantling of the SADC Tribunal

But how did we arrive at the 2018 High Court decision? In 2000, the SADC's (then) 14 member states adopted a protocol (tribunal protocol) on the erection of the SADC Tribunal which was supposed to oversee economic co-operation and integration in Southern Africa. According to Article 15 of the tribunal protocol, the Tribunal is competent to decide disputes between states and 'between natural or legal persons and States'. The protocol entered into force in 2001 when an amendment,which incorporated the protocol into the SADC Treaty, had been adopted with the required three-quarters majority.

Not long after, though, the SADC Tribunal received some scholarly attention as a prime example for backlash to international adjudication. In one of its first cases, the Tribunal decided in 2008 in favour of Zimbabwean white land owners that measures based on the violent Zimbabwean land redistribution program violated the principle of non-discrimination on the basis of race and the right of access to justice as enshrined in the SADC Treaty. Zimbabwe did not comply with the judgment and the white farmers were only able to enforce a cost order against Zimbabwean property in South Africa via a 2013 decision of the South African Constitutional Court. In the meantime, then Zimbabwean President

Robert Mugabe and his Justice Minister successfully lobbied other SADC members to react strongly to the 2008 judgment. Because the terms of five judges were not prolonged at SADC summits in 2010 and 2011, the Tribunal could no longer hear new cases and was *de facto* suspended. Furthermore, in 2014 nine member states including South Africa signed a new protocol that restricted the SADC Tribunal to only hearing inter-state disputes and thereby abandoned the individual complaints mechanism. Despite lacking one signature as well as the ratifications necessary for its entry into force, the new protocol is regarded as the death blow for the Tribunal because it demonstrates that the individual rights mechanism has no future.

Violations of the SADC Treaty and the South African Constitution

The Law Society of South Africa and others brought a claim against the South African Presidency, the Minister of Justice and the Minister of International Relations attacking the decisions not to appoint new judges and to sign the new protocol limiting the jurisdictional scope of the SADC Tribunal. The High Court ruled in favour of the applicants and held unconstitutional South Africa's participation in suspending the SADC Tribunal and its signing of the new protocol. Regarding the latter, it reasoned that the abolition of the individual complaints mechanism through the President's signature in 2014 violated the SADC Treaty. In particular, the Court referred to the principles of human rights, democracy and the rule of law as enshrined in Article 4 c SADC Treaty and the obligation of member states to refrain from 'taking any measure likely to jeopardize the sustenance of its principles' (Art. 6 SADC Treaty). According to the High Court, it would not be permissible to 'emasculate a SADC organ established by the SADC Treaty itself' (para. 64) and the signature would demonstrate 'South Africa's participation in a conspiracy initiated by the President Mugabe-regime in Zimbabwe to undermine an essential SADC Institution's ability to enforce a fundamental SADC objective: compliance with the Rule of Law and human rights' (para. 64). Furthermore, the Court held that taking the decision to adopt the new protocol without approval of parliament violated the constitution (para. 66). The signature would also be irrational and not justified by a legitimate governmental purpose because it would not promote democracy, human rights and the rule of law but instead 'sign […] away' the Tribunal's jurisdiction against advice from independent experts and without consultation of the South African parliament (paras. 68, 69). Similarly, the *de facto* suspension decisions from 2010 and 2011 would be in conflict with the SADC Treaty and South Africa's constitutional obligations (para. 67).

An Exemplar for Foreign Relations Law?

The decision is highly interesting from a foreign relations law perspective. Most recent court decisions on foreign affairs law like the ICC withdrawal case and the *Miller* judgment have focused on the division of competences between the legislature and the executive. The South African High Court takes up this argumentative theme but key to its decision are substantive violations of human rights. In the Court's view, the dismantling of the individual complaint's mechanism of the SADC Tribunal is directed against human rights and the rule of law and thus violates the South African constitution.

It is easy to criticize the judgment for its scarce reasoning. For instance, the Court does not properly explain why a violation of the SADC Treaty amounts to a violation of the South African constitution. Moreover, it is not sufficiently substantiated why parliament has to be involved in the decision-making process *before signature* of the new protocol even though section 231 (1) of the South African constitution provides the executive with the exclusive competence to sign international treaties. Also, one might ask why South Africa should not be allowed to change the competences of one SADC organ when it has the power to withdraw from the SADC Treaty as a whole (Art. 34 SADC Treaty). Furthermore, placing such substantive limits on domestic treaty making decisions might have immense repercussions for consent-based international law in other contexts. Applying the Court's (albeit scarce) reasoning, would this mean that Britain could not leave the European Court of Justice's jurisdiction for claims brought by individuals? Would the Latin American withdrawals from the Inter-American Court of Human Rights be unconstitutional because they might have repercussions for the rights enshrined in the respective domestic constitutions?

However, the decision entails intriguing ideas for building a more principled foreign relations law in the South African context. As has been argued on this blog, in a line of judgments the Constitutional Court in South Africa indicated that the plea for executive foreign policy discretion would no longer prevail in its jurisprudence. Indeed, it seems that foreign policy decisions in South Africa should not be devoid of substantive constitutional oversight. The South African constitution is known for granting international law a particularly strong role when interpreting the Bill of Rights (section 39 1b South African Constitution), which might justify treating violations of the SADC Treaty as violations of South African constitutional rights. Furthermore, because the dismantling of the SADC Tribunal means abolishing effective human rights protection in the SADC *per se*, the particular pervasive consequences for human rights and the rule of law indeed lead to concerns from a constitutional law perspective. Also, the applicants skillfully stress in the appeal proceedings that the *de facto* suspension of the Tribunal has to be treated like a withdrawal and that therefore parliament has to be involved. More generally, the decision demonstrates very well that national courts might play an important part in fighting the recent backlash against international institutions. By reminding states of their constitutional values and obligations, domestic courts can try to protect international institutions and judicial organs based on such values. It will be fascinating to see how the South African Constitutional Court will position itself in the ongoing litigation.

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